LEMBAGA AIR PERAK v. DING KENG LONG & ORS; PENTADBIR TANAH MANJUNG & ANOR (THIRD PARTY)

HIGH COURT MALAYA, IPOH
ANSELM CHARLES FERNANDIS JC
[CIVIL SUIT: AA-22NCVC-156-10-2016]
28 SEPTEMBER 2018

TORT: *Negligence – Damages – Claim – Land matters – Excavation and removal of earth – Earth works on land created dangerous situation on adjacent land – Whether claimant had necessary locus standi to file suit – Whether earth works resulted in structure of slope to be in very dangerous state – Whether posed threat to safety – Whether sum claimed for reasonable – Whether contractor complied with conditions imposed by land administrator in carrying out works – Whether contractor agent, servant, contractor and/or employee of land owners*

The plaintiff was the occupier of a piece of land ('the land') on which stood reservoirs. The land was leased to the plaintiff by Pengurusan Aset Air Bhd *via* a lease agreement ('exh. P12'). The first and second defendants, the registered owners of the land ('the defendants' land') next to the plaintiff's land, engaged the third defendant, a contractor, to excavate and remove earth from the defendants' land ('the works'). The third defendant commenced the works on the defendants' land upon the approval by the Pentadbir Tanah Manjung ('the PTM'). The plaintiff later received a complaint from a member of the public that the works were too close to the reservoirs. An inspection conducted by the plaintiff showed that the slopes on the defendants' lands had created a dangerous situation. The plaintiff informed the defendants about the dangerous situation and told them to, *inter alia*, stop the works immediately and remedy the situation. After negotiations between the parties failed, the plaintiff commenced the present action, claiming for RM5,668,989.22, against the defendants. The first and second defendants subsequently brought third party proceedings against the PTM and the Perak State Government on the ground that it was the PTM that had issued the permit to the third defendant for the works. The issues that arose were (i) whether the plaintiff had the *locus standi* to file the present suit; (ii) whether the works resulted in the structure of the slope to be in a very dangerous state, posing a threat to the safety of the reservoirs; (iii) whether the third defendant was an agent, servant, contractor and/or employee of the first and second defendants; (iv) whether the sum claimed by the plaintiff against the defendants was reasonable; (v) whether the plaintiff was estopped from claiming any damages from the defendants as a result of an agreement or promise, by the plaintiff, to take over the defendants' land and to finance the remedial work of strengthening the slope; and (vi) whether the works complied with the conditions imposed by the third party.

Held (allowing plaintiff's claim with costs; dismissing defendants' claim against third parties):

(1) The plan of the land, which was attached and forming part of the document of title ('exh. P14') of the land, was shown to be next to the defendants' land. There was a nexus between the land described in exh. P14 to the reservoirs mentioned in exh. P12. Considering all the evidence as a whole, the land was covered by exh. P12 and the plaintiff had the *locus standi* to bring this action as they were lessee to the land where the reservoirs were situated. (paras 62 & 67)

(2) Based on the evidence of the experts, their reports and the evidence in totality, the works carried out by the third defendant on the defendants' land had resulted in the structure of the slope to be in a dangerous state, posing an immediate threat to the safety of the reservoirs. The material time to consider was at the time the situation demanded immediate response. It would be unreasonable for the plaintiff to (i) take the risk and allow the works to continue with the knowledge that disaster could strike any time; and (ii) be idle despite the work being stopped. Furthermore, the land was entitled to the right of support by the defendants' land and this right was recognised in both common law and s. 44 of the National Land Code. (paras 75, 77 & 78)

(3) The third defendant was a servant or agent of the first and second defendants as, not only have they engaged the third defendant, they have also instructed the third defendant on how the work was to be done. The very act of the third defendant in carrying out the works was, by itself, inherently risky and perilous. As there was a considerable risk of slope failure which would destabilise the land, the first and second defendants owed a duty to the plaintiff to ensure the works were done properly. The first and second defendants, together with the third defendant, were liable as joint tortfeasors to repay the plaintiff the sum incurred and claimed for the remedial work. (paras 84 & 86)

(4) The plaintiff's claim was based on oral and documentary evidence of the amount expanded in taking remedial action to stop the progressive failure of the slope on the defendants' land. The payments for the remedial work were well-documented. There was no convincing evidence to show that the amount spent was unreasonable especially so when there were witnesses and documents to support the claim. The amount claimed for was both reasonable and necessary. (para 87)

(5) According to the first defendant, there were two meetings held regarding the dangerous situation created by the slope. These meetings formed the basis of the defendants' contention that they were not liable for any damages as the plaintiff had agreed to acquire the part of the land

affected by the slope. It was reasonable for the plaintiff to commence remedial works on the defendants' land, bearing in mind the urgency of the situation. However, the first and second defendants' contention that the plaintiff had promised to acquire the land and, at the same time pay for the remedial work, would not be logical when it was evident that the defendants, as joint tortfeasors, had caused the dangerous situation at the slope in the first place. (paras 88, 91 & 95)

(6) There was evidence that the third defendant had breached the specified condition in *Pekeliling PTG.PK Bilangan 5 Tahun 2009 ('Pekeliling').* The *Pekeliling* stated, *inter alia*, that 'Di dalam kawasan penggalian tanah yang diluluskan … kerja-kerja menggali hendaklah sekurang-kurangnya … jarak jauh 62 meter daripada sempadan …'. The works carried out were much less than 62 meters from the fence to the land. The actions of the third defendant caused a dangerous situation. As such, the third party could not be blamed for the damage caused. The third party had no duty to monitor or supervise the work progress of the third defendant. (paras 101 & 103)

Case(s) referred to:

Dalton v. Henry Angus & Co (1881) 6 App Cas 740 ***(refd)***

Honeywill and Stein, Limited v. Larkin Brothers (London's Commercial Photographers Limited [1934] 1 KB 191 ***(refd)***

Hong Leong Finance Bhd v. Low Thiam Hoe & Another Appeal [2015] 8 CLJ 1 FC ***(refd)***

Ismaga Bina Sdn Bhd v. Govindasamy Viswalinga Thevar [1993] 4 CLJ 440 HC ***(refd)***

Mehrzad Nabavieh & Anor v. Chong Shao Fen & Anor And Another Appeal [2016] 5 CLJ 236 CA ***(refd)***

Pemilik Dan Kesemua Orang Lain Yang Berkepentingan Dalam Kapal "Fordeco No 12" Dan "Fordeco No 17" v. Shanghai Hai Xing Shipping Co Ltd [2000] 1 CLJ 605 FC ***(refd)***

Wong See Lee & Ors v. Ting Siik Lay [1997] 2 CLJ 205 FC ***(refd)***

Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***

Legislation referred to:

National Land Code, s. 44

For the plaintiff - Daniel Abdul Rahman & Faizal Kamaruddin; M/s Mad Diah Faizal & Co

For the 1st & 2nd defendants - Kelvin Ding; M/s Nga Hock Cheh & Co

For the 3rd defendant - Mah Kok Leong & Lau Chee Foon; M/s KS Su & Mah

For the 3rd party - Suhaila Haron; State Legal Advisor, Perak

Reported by Najib Tamby

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JUDGMENT

Anselm Charles Fernandis JC:

Introduction

[1] The plaintiff is a body which was set up under the Perak Water Board Enactment 1988. They were occupier of the land which was used for the storing of treated water known as Air Manjung A & B (the reservoirs). The reservoirs were built in 1986. The land on which the reservoirs stood were leased to the plaintiff by Pengurusan Aset Air Berhad by virtue of a lease agreement dated 23 May 2012 (P12). The plaintiff was responsible for the administration, safety and maintenance of all the assets on the land including the reservoirs.

[2] The land on which the reservoirs are situated on is known as Hak Milik Sementara No.H.S.(D) 38285, No P.T. 17911, Mukim Lumut, Daerah Manjung, Negeri Perak Darul Ridzuan (the said land). It had an area of 0.9263 hectares.

[3] The reservoirs operated as storage for treated water which supplied water to consumers at the Manjung district in Perak. The consumers of the treated water included hospitals, government departments and other strategic places. Each reservoir had a capacity of 2,000,000 liters. The plaintiff was the sole supplier of treated water in the State of Perak.

[4] The first and second defendants are registered owners of the land which is next to the said land. They jointly owned land described as Grant Mukim 2560, Lot 17488 Mukim Lumut, Daerah Manjung, Negeri Perak (the first and second defendants' land). The defendants' land had an area of about 1.9 hectares.

[5] The third defendant is a contractor. He was engaged by the first and second defendants to excavate and remove red earth from their land.

[6] By virtue of a letter dated 22 September 2012 from the Pentadbir Tanah Manjung, the third defendant's application for the removal or transfer of 5,000 metric red earth on the first and second defendants' land was approved by the Pentadbir Tanah Manjung. The approval however was subject to conditions which were stated in the letter.

[7] Upon the instructions of the first and second defendants, the third defendant commenced work to remove the red earth from the first and second defendants' land as well as to cut terraces on a slope.

[8] On 15 October 2012, the plaintiff's representative received a complaint from a member of the public informing that excavation and earth removal works on the first and second defendants' land were being carried out too close to the reservoirs.

[9] An inspection conducted by the plaintiff's representatives on 16 October 2012 found that the slope on the first and second defendants' land had created a dangerous situation. Excavation works were being carried out which could cause damage to the structure of the said land and cause slope failure and damage to the reservoirs.

[10] A police report was lodged and the Pejabat Tanah was informed of the matter. A meeting was held between the plaintiff, the third defendant and representatives from the Pejabat Daerah Manjung on 19 October 2012. The plaintiff issued a letter dated 14 November 2012 to the first defendant informing him the excavation and removal of the red earth by the third defendant had endangered the reservoirs. The defendants were asked to stop work immediately, remedy the situation and take further action to stabilise the slope and to adhere to the guidelines imposed by the authorities. Further they were asked to obtain suggestions from a professional consultant engineer on ways to remedy and stabilise the slope.

[11] There were negotiations between the plaintiff, first defendant and Pejabat Tanah. These negotiations failed and the plaintiff brought this action against the defendants.

[12] The first and second defendants subsequently brought third party proceedings against the Pentadbir Tanah Manjung and the Kerajaan Negeri Perak. This was because the first third party had issued the permit to the third defendant to remove the earth from the site.

Plaintiff's Case

[13] It is the plaintiff's contention that the defendants had knowledge of the reservoirs situated next to the first and second defendants' land. Since the existence of the reservoirs there was signage showing the existence of the reservoir in the vicinity.

[14] In the course of the trial, the plaintiff had called eight witnesses. One of these witnesses was SP2 Mohd Shukri bin Mohd Zubir who was responsible for the making of payments to third parties based on payment claims which had been approved by the plaintiff. The pertinent portion of his evidence was concerned with the amount expended by the plaintiff in stabilising the slope near the reservoir which was RM5,667,399.22. He gave this breakdown as follows:

> S: Berapa jumlah yang kos keseluruhan yang telah dikeluarkan oleh LAP dalam isu pengorekan pada cerun yang menempatkan Kolam-kolam Air milik LAP tersebut?
>
> J: Jumlah keseluruhan yang dikeluarkan oleh LAP adalah RM5,667,399.22 yang merupakan pembayaran kepada pihak-pihak seperti berikut:
>
> (a) Bayaran kepada Jurukur Berjasa (M) Sdn Bhd berjumlah RM10,485.50 (muka surat 109 Ikatan Dokumen Bersama Bahagian B) untuk kos kerja-kerja pengukuran;

(b) Bayaran kepada An Aktif Enterprise sebanyak RM9,500.00 untuk kerja-kerja awalan kecemasan (muka surat 111 Ikatan Dokumen Bersama bahagian B);

(c) Bayaran kepada Moqal Enterprise sebanyak RM27,900.00 (muka surat 45 Ikatan Dokumen Tambahan Plaintif) untuk kerja-kerja awalan sementara/kecemasan;

(d) Bayaran kepada Mohd Asbi Associates Sdn Bhd sebanyak RM306,279.22 (muka surat 112-122 Ikatan Dokumen Bersama Bahagian B) untuk yuran perunding dan fee penyelia;

(e) Bayaran kepada Teroka Jaya Sdn Bhd sebanyak RM5,313,234.50 (muka surat 123-149 Ikatan Dokumen Bersama Bahagian B) untuk bayaran penuh tender bagi kerja-kerja baik pulih cerun.

[15] The relevant documents were produced through SP2 as proof of the payments made by the plaintiff.

[16] According to the evidence of SP3 who is the asset, safety and health engineer for the plaintiff, it was obvious that the excavation work carried out by the third defendant posed an imminent danger to the reservoirs. This can be seen from the survey plan prepared by Juru Ukur Berjasa (M) Sdn Bhd. Out of concern for the situation the plaintiff had engaged Jurukur Berjasa to do a survey and mark the boundaries of the area as well as ascertain the status of the work done by the third defendant.

[17] SP3 stated that the slope was only about 20 metres from the reservoirs. The distance from the edge of the land on which the reservoirs stood was far less than 20 meters from the slope. SP3 further reiterated that the first defendant had also engaged a consultant engineer namely PYK Consultant to prepare a report for remedial work to be done to stabilise the slope. This report is marked P25.

[18] The plaintiff also engaged the services of Messrs Mohd Asbi and Associates Consultant Civil Engineers, Structural and Geoteknikal to prepare a report on the stability of the slope. Among the comments and recommendations made by Messrs Mohd Asbi was that the slope created by the defendants in the removal of the red earth was dangerously close to the reservoirs. The removal of the red earth resulting in the slope had breached the minimum "Factor of Stability" set by the Jabatan Kerja Raya (JKR) which was 1.40. Immediate remedial work necessitated the services of Moqal Enterprise and An Aktif Enterprise which carried out remedial work to temporarily contain the situation.

[19] According to SP3, the first defendant and the plaintiff were initially trying to settle the matter. There were negotiations as to who should bear the cost of the remedial work. The plaintiff was agreeable that PYK Consultant do the remedial work using the "backfill" method as suggested in the report

prepared by PYK. The first defendant however did not carry out the works as suggested earlier but suggested instead that the Government acquire the defendants' land. The first and second defendants proposed that the plaintiff acquire their land as they were not willing to pay for the cost of the remedial work. It was however suggested by the plaintiff that the plaintiff acquire that portion of the first and second defendants' land. This was conveyed to the Pengarah PTG by a letter dated 26 June 2013.

[20] The first and second defendants were not agreeable for the plaintiff acquiring only part of the defendants' land. They further stated that they would only be agreeable to remedial work being carried out if the cost of such work was borne by the plaintiff.

[21] In seeking a solution to the problem, a meeting was held on 17 June 2014 at the Pejabat Daerah dan Tanah Manjung where SP3 himself was present at the meeting.

[22] At the meeting, it was agreed that initial remedial work would be carried out by the plaintiff and that the first and second defendants allow the plaintiff onto their land to do such work. There was also agreement that only that part of the land necessary for remedial work to be done will be acquired. The Pejabat Daerah dan Tanah Manjung then issued a notice for the purpose of an inquiry to be held for the acquisition of that portion of the defendants' land. From the "Borang H" which was issued, it stated that 0.9478 hectares of the defendants land was to be acquired. The plaintiff however subsequently withdrew their proposed acquisition.

[23] The plaintiff had to proceed with the remedial works to avoid further worsening of the danger posed by the slope and of Messrs Mohd Asbi and Associates proceeded with their work.

[24] SP3 vehemently denied that the plaintiff had agreed to acquire the whole of the first and second defendants land and to bear the cost of the remedial work. He reiterated that the stand of the plaintiff was as in the letter dated 26 June 2013 to the Pengarah PTG. He asserted that at all material times the cost of the remedial work was to be borne by the defendants. It was on this basis the plaintiff had engaged the consultant engineer and issued the tender forms in the expectation that the defendants would pay for the remedial works. SP3 confirmed the amounts paid to the various parties doing the remedial works.

[25] SP4 was the surveyor in Jurukur (M) Sdn Bhd the plaintiff had engaged his services to do survey work and to mark the boundaries on the affected land. He was referred to exh. P19, a plan which was prepared under his supervision. To indicate the precarious situation the reservoirs were, he stated that the closest distance between the slope and the fence around the reservoir was only 3 meters. He confirmed that the plaintiff had paid RM10,485.50 to Jurukur (M) Sdn Bhd.

[26] SP5 Mohd Kamal bin Mohd Noor was the proprietor of Moqal Enterprise. They did the initial work to do the repair work on the slope. They had set up a green plastic cover known as SP soil protector over the affected area. He confirmed receiving RM27,900 from the plaintiff.

[27] SP6 Anuar bin Omar, a contractor from An Aktif Enterprise was also involved in initial remedial work. He had covered the affected area with a sheet of plastic to prevent the slope from failing. He confirms being paid the sum of RM9,000 by the plaintiff for the work done.

[28] SP7, Ahmad Mohktar bin Muhammad is the managing director of Teroka Jaya Sdn Bhd. A major portion of the remedial and stabilisation work on the slope was carried out by Teroka Jaya Sdn Bhd. The company is a grade G Contractor which specialises in geotechnical and stabilisation concerning slopes. They had 20 years' experience in this field. Ninety-eight stabilisation and remedial works had been carried out by them before this. Of these, 36 were "emergency" works for Jabatan Kerja Raya, water supplying companies, higher education institutions, Jabatan Perhutanan and companies dealing with oil and gas. They were appointed by a tender process.

[29] The acceptance letter was shown as exh. P37. The remedial work was based on the "design drawings" and specifications prepared by Mohd Asbi Association Sdn Bhd (SP8) who were the consultant engineers for the slope remedial. The whole of the remedial work took about six months to complete. A certificate of practical completion was obtained on 15 July 2015. Teroka Jaya Sdn Bhd was paid a total of RM5,313,234.50 by the plaintiff for the work done.

[30] Of particular significance is the evidence of the consultant geotechnical engineer Dr Mohd Asbi bin Othman (SP8). He is also the director of Mohd Asbi Associates Sdn Bhd. His resume was attached to his witness statement and was not disputed. Briefly, he has a degree in civil engineering from the University of Southhamton and a Doctorate in Geotechnical Engineering from the University of Bristol. He is also an accredited checker with the Board of Engineers of Malaysia. He had written more than 40 papers in journals and for local and intranational conferences. He had been in the field of geotechnical engineering since 1983. Messrs Mohd Asbi also recommended immediate remedial work to ensure the structural integrity of the reservoirs was intact.

[31] He had prepared a report called "Preliminary Assessment of the Destabilised Slope at Sri Manjung Reservoir A and B, Ipoh, Perak Darul Ridzuan". This document was introduced as exh. P17. In his evidence, SP8 said that a site visit was made on 20 October 2012 to collect data as well as to prepare for the preliminary report. He had obtained data from the mapping and survey done by Jurukur Berjasa and detailed data with regard to the topography, geomorphology and hydrology gathered while mapping the site.

[32] SP8 then referred to para. 5 of his preliminary assessment report where he clearly stated that immediate emergency measures had to be carried out. The factor of stability (FOS) set by JKR was not been achieved. The minimum FOS set by JKR is 1.40 and anything less than that is considered dangerous. In the present case, the FOS in respect of the slope in this case is 0.892 which is categorised as very dangerous. The situation was to say the least dire with progressive slope failure imminent. This failure would progressively reach the reservoir if strengthening works had not been carried out. He however did not state a timeframe as to the progression to the reservoir. All the recommendations made by SP8 were accepted by the plaintiff. The recommendations can be found at P45. This document is entitled "Cadangan Pemulihan Cerun Di Tapak Kolam Air Seri Manjung, Kampung Padang Pundut, Mukim Lumut, Daerah Manjung, Perak Darul Ridzuan".

[33] The recommendations were carried out by the contractors Teroka Jaya Sdn Bhd. SP8 overseered the remedial work done by Teroka Jaya. He confirmed that Teroka Jaya was paid RM5,313,234.50 for the work done.

The First And Second Defendants' Case

[34] The first and second defendants had called their consultant structural engineer Pang Yoon Khong (SD1) to give evidence. He evinced that there were no legal requirements that all slope must be made to the angle of 1:5. He went on to say that if the slope was allowed to be completed with the drainage as he proposed in his report P25 it would not pose any danger to the reservoirs.

[35] The first defendant (SD2) gave evidence that he had engaged the third defendant to create terraces for the planting of rubber trees. There is a letter of appointment dated 4 April 2012. The first defendant regarded the third defendant as an independent contractor. SP1 evinced that the Pejabat Tanah (the third party) had on several occasions issued permits for rock extraction to the third defendant. He had done a careful study of the boundary between lot 17488 belonging to him and lot PT 17911 where the reservoirs were at and therefore did not encroach onto the plaintiff's side. He asserted that the earthworks carried out by the third defendant did not endanger the said land. The third party had prevented the third defendant from carrying out further excavation before the third defendant could complete the work.

[36] The third defendant had dealt with the third party with all matters pertaining to the permit for the rock removal. According to the first defendant, before a new docket book is issued the third party would inspect the work progress of the third defendant at the excavation site. He stressed that the third party knew all along that the LAP reservoirs were situated next to the first and second defendants' land. This was evinced from the report on the application for permission to transfer rock material which is exhibited

as P49. By reason of this, the first and second defendants had brought third party proceedings against the Pentadbir Tanah Manjung and the State Government.

[37] The first defendant stated that there were attempts to settle the matter with the plaintiff. At p. 11 of his witness statement, he states two meetings were held on 29 March 2013 and 17 June 2014 in pursuit of a settlement. On the first meeting, it was suggested by the plaintiff that the first and second defendants were to pay for the remedial work. This was flatly refused by the first defendant as can be seen from his answer to question 11 of his witness statements. By way of letter dated 29 March 2013 the first defendant's solicitors wrote to the plaintiff. The letter showed that the first defendant wanted the plaintiff to buy over the whole of the first and second defendants' land at a price of RM1,650,000. It was a condition for the first defendant to allow the plaintiff to "membuat kerja-kerja pemulihan dan penstabilan mengikut garis panduan tuan atas bayaran, caj dan kos pihak tuan." This can be seen at P28.

[38] At the second meeting on 17 June 2014, the first defendant claims that it was agreed that the plaintiff was allowed to enter the first and second defendants' land. The plaintiff was allowed to do only initial remedial work on the slope on the condition the plaintiff acquire the whole of the first and second defendants' land and that the first and second defendants would be adequately compensated for the acquisition. According to the first defendant, these terms were evinced in the minutes to the meeting shown as exh. 31.

[39] An inquiry was held on 17 June 2015 where SD1 and his wife were offered a total sum of RM1,480,144 for their land. They had signed the Borang H for the notice of award and offer of compensation for the acquisition. This is exhibited at D41. The exercise was however futile as the plaintiff had cancelled the acquisition of the first and second defendants' land. The first defendant therefore claims that the plaintiff had used the acquisition to trick him into allowing them to enter the first and second defendants' land to do the remedial work and forcing him to pay the whole of the repair work.

[40] He stressed that without the first and second defendants' permission, the plaintiff would not be able to gain access to repair the slope. Further the access given pending the land acquisition was only for initial maintenance and survey. The first defendant did not consent to do full remedial work. The first defendant went so far as to say that the remedial work done by the plaintiff was illegal as he had never consented or allowed to the full remedial work to be done. He states that he reserves the right to commence action against the plaintiff for trespass. His asserted that "Kami telah dianiayai dan ditindas LAP melalui muslihat dan penipuan LAP."

[41] According to the first defendant, he did inform the plaintiff of his plan to do rubber tree terraces at the slope with proper drainage and vegetation cover and other erosion prevention methods to make the slope safe. This was informed to the plaintiff at a meeting on 21 February 2013. The conditions set by the first defendant is set out clearly in their letter to the plaintiff dated 29 March 2013 and exhibited as P28. According to SD2 the sole cause of the situation of the slope was because of the negligence of the plaintiff and the third defendant.

[42] His visit to the site of the slope sometime in November 2017 gave him the impression that the retaining wall built was even closer to the boundary fence of the said land than before. According to SD2 the retaining wall was only three meters away from the reservoir wall. To him the building of the retaining wall made the situation more dangerous in contrast if the rubber tree terraces he planned to do was allowed to proceed.

[43] Lastly, he complained that the road leading to his land was littered with rubbish and grass which made his land useless. Again, SD2 said he reserved his rights to bring action against the plaintiff.

[44] The third defendant was Wan Fook Huat. He states that he works as a contractor. His job also encompasses earth excavation. He had been engaged by the first and second defendants to remove the earth from Lot 17488 and create terraces for planting rubber trees. The appointment letter is tendered as D48. The Pejabat Tanah Manjung had issued him a permit (D51) to do rock extraction on the first and second defendants' land. A number of permits had been successively issued to the third defendant from 14 May 2012 through to 27 October 2012. Each time the 4C permit was renewed the permit was accompanied by a letter from the Pejabat Tanah outlining the terms and conditions the permit was issued. Further there was no problem renewing the docket book several times for further earth removal to be done. He had also paid royalty for the earth removed.

[45] He denies that he had caused the slope to be in a dangerous situation. In gist, he states that he was merely following the instructions of the first and second defendants as well as the third party. He further states that the officers from the third party would inspect the site of the excavation and did not complain about anything.

[46] He went on to say he did not know of the existence of the reservoirs on the said land. He asserts that the remedial cost was too high and was unreasonable. He finally states that the slope was rendered dangerous because he was asked to stop work. This implies that if he had been allowed to continue the slope would not be in the dangerous situation as it was. At the time of working on the slope, there was no incident of landslides (tanah runtuh) on the said land.

A **The Third Parties' Case**

[47] SD4 who was from the Pejabat Daerah dan Tanah Manjung stated that he had received the application from the third defendant for a 4C permit to remove rocks. The application came with a letter of consent from the first and second defendants. The relevant documentation for the application is at
B D53.

[48] The application was subsequently referred to four departments for their feedback namely Majlis Perbandaran Manjung, Jabatan Pengairan dan Saliran, Jabatan Kerja Raya and Jabatan Alam Sekitar. The application was also sent to Penolong Pegawai Tanah (witness SD5) for a report to be made
C (D49). After the relevant departments had given their approval, a letter dated 14 May 2012 from the Pentadbir Tanah was sent to the third defendant approving his application (D50). Apart from the usual conditions imposed, of particular importance was that the third defendant was to adhere to the conditions as set out in the Circular called "Pekeliling PTG Bilangan 5
D Tahun 2009". The relevant portion of the letter states:

> Pihak tuan adalah dikehendaki mematuhi syarat-syarat daripada Jabatan Teknikal seperti di LAMPIRAN berkepil dan Pekeliling PTG.PK Bilangan 5 Tahun 2009.

E A copy of the said Pekeliling is found at pp. 262 to 283 of common bundle B.

[49] On being informed that his application had been approved, the third defendant was issued with receipts for the payment of the royalty for removal of the earth, the docket book and also for the payment for a copy of the said
F "Pekeliling PTG Bilangan 5 Tahun 2009". The receipts are shown in D52.

[50] There were four other subsequent applications for 4C permits made by the third defendant regarding the same land. These were regarded as a renewal of the original permit and therefore no further feedback from the relevant authorities were needed.

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[51] SD5 basically reiterated the process as stated by SD4 with regards to the application made by the third defendant. SD5 had also prepared a report on excavation works to be done on the land. In his report, he stated that the approval to the third defendant's application has to be on condition he adheres to the "Pekeliling PTG Bilangan 5 Tahun 2009".
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[52] He said that upon the renewal of each 4C permit there was no necessity to obtain the approval of the other departments. Apart from the periodic inspection by the Unit Teknikal dan Penguatkuasaan on the first and second defendants' land, there was no specific inspection for the renewal of the 4C
I permit. He further said that the purpose the docket book was issued to the third defendant was to permit for transport the earth and also to ensure and enforce the specified amount of earth as stated in the permit was being removed.

[53] SD6 was the Penolong Pegawai Tanah at the Unit Teknikal dan Penguatkuasaan, Pejabat Tanah Daerah Manjung. He went to the site of the earth excavation on 19 October 2012. His investigation in respect of permit 4C showed that the earth extraction had resulted in a slope of 70 degrees. There were four terraces each about five meters broad between the first and second defendants land and the said land. He had prepared a report which can be found at P56. His report showed pictures of the site at the time of inspection.

[54] He had advised the third defendant not to do further excavation work as there was a potentially high risk of soil erosion. He also prepared a plan of the area and also took photographs of the site. A further report conducted on 23 October 2012 at the site is shown in P57.

[55] SD6 stressed that the enforcement of the terms of the permit was only concerned with the checking of the docket book. They were not responsible for monitoring the progress of the excavation work carried out by SD3.

[56] He stated that the Pejabat Tanah never instructed the third defendant to stop work. He merely asked the third defendant to take the necessary precautions.

Issues To Be Considered

[57] In considering the issues in this case, I am guided by encl. 29 where the parties had compiled the common issues to be tried. The issues can be consolidated and categorised in the following topics.

Whether The Plaintiff Has Locus Standi To File This Suit

[58] The third defendant had brought up the issue of whether the plaintiff had the *locus standi* to act against the defendants. Their reasoning is that the land which on which the reservoirs are situated was leased to the plaintiff by Pengurusan Aset Air Berhad (PAAB). This was pursuant to an agreement dated 23 May 2012 between PAAB and the plaintiff. This agreement was tendered as exh. P12 through SP3. According to SP3, the plaintiff was responsible for all the assets mentioned in the agreement and could therefore bring this action against the defendants. The third defendant however contends that the said land is not mentioned in either schedule A or B of the agreement as being part of the assets of the plaintiff. That being the case, the plaintiff does not have *locus standi* to bring this action.

[59] The plaintiff on the other hand asserts that the said land is included under "SCHEDULE B [non-titled land]" at para. 6 under the sub heading "Tangki dan Kolam" at item number 39 where it is described as "KOLAM-F.R.C RESERVOIRS S/PK(BA)" under the column headed "NAMA ASET". Under the column "ALAMAT" it states "Kg Tersusun Pundut. Jalan Sitiawan Lumut. Under the column "NO. LOT" it is stated "5102". The said land though is described in the statement of claim as "Hak Milik

Sementara No. H.S.(D) 38285, No P.T. 17911, Mukim Lumut, Daerah Manjung, Negeri Perak Darul Ridzuan". Hence the third defendant's contention that the plaintiff does not have *locus standi*.

[60] It was argued by learned counsel for the plaintiff during submissions, that neither SP3 nor any other witness cross-examined on this point although it was stated as a triable issue under the issues to be tried (encl. 29).

[61] Further, plaintiff's counsel states that the first and second defendants' witness SD1 gave a similar description in his report exh. D25 that is "Kampung Padang Pundut, Mukin Lumut, Daerah Lumut".

[62] I had perused the document of title of the said land which is exh. P14. I noted that the entries in the land coincide with the said land described in the statement of claim. The land is registered under "Pegurusan Aset Air Berhad" which is the lessor in the agreement exh. P12. Under the heading "Syarat-Syarat Khas Mengenai Hakmilik Sementara" it states "Perusahaan Bekalan Air". Under "Sekatan-Sekatan Kepentingan" it specifically states that the land cannot be charged or leased without the written consent of the State Authority. The written consent is not required if it is leased to "Lembaga Air Perak", the plaintiff herein. This is evident from the words "melainkan pajakan kepada Lembaga Air Perak." All these entries in the land title accord with the contents of the agreement exh. P12. It is also pertinent to note that the plan of the said land which is attached and forming part of P14 is shown to be next to the first and second defendants' land which is Lot 17488. All these factors show a nexus between the land described to in P14 to the "reservoirs" mentioned at item 39 in P12.

[63] Further, the plans produced in court as P13, P19, P25 and P45 show that the first and second defendants' land is adjacent to the said land. These plans are similar to the one shown at "Borang 2" attached to the land title P14. There is also evidence from SP1, SP3 and SP8 the said land affected by the slope is occupied by the plaintiff who has management and care of the reservoirs. Payments were made by the plaintiff to the various contractors who were involved in the remedial work on the slope. In this respect, it is clear that a lessee has the *locus standi* to act on any matter concerning the land. *Ismaga Bina Sdn Bhd v. Govindasamy Viswalinga Thevar* [1993] 4 CLJ 440.

[64] There is also documentary evidence presented such as photograph number 2 at p. 4 of P17 which shows the signage with the words "Tangki Ternaik Lembaga Air Perak" with the reservoirs at the background. The contents of this photograph were not disputed.

[65] Cross reference can also be made between P16 and the land title P14. P16 is a letter conveying the decision of the Majlis Mesyuarat Negeri Perak that the said land be transferred to Pengurusan Aset Air Berhad and thereafter leased to the plaintiff on terms which are as stated in P14. This was for the purpose of the "Project Penstrukturan Industri Air" in Perak. The total size of the land transferred is 0.9263 hectares. This corresponds to the size of the land as stated in the land title P14. P16 also accords with the contents in P12. The contents of P16 is supported by the letter from Pengurusan Aset Air to the Pentadbir Tanah dated 13 December 2012 (P15).

[66] This court does realise that there is a different lot number attributed to the land on which the reservoirs are at in P12. The determination as to the description of the land in P12 must however, be looked at from all the other available evidence which show that at the material times, the plaintiff as lessee and was in occupation of the said land.

[67] I am of the view therefore that in considering all of the evidence as a whole the said land is covered by the agreement exh. P12 and the plaintiff has *locus standi* to bring this action as they are lessee to the land where the reservoirs are situated.

Whether The Excavation Of Red Earth Carried Out By The Third Defendant On The Land Of The First And Second Defendants Resulted In The Structure Of The Slope To Be In A Very Dangerous State Posing A Threat To The Safety To The Reservoirs As Well

[68] The main witnesses that will determine this issue would be SP8 for the plaintiff and SD1 for the first and second defendants. SP8 and SD1 are experts in their own field. At the start, I would want to say that the credentials as to his expertise presented by SP8 was both more impressive and assuring than that presented by SD1.

[69] SP8 made a site visit on 20 October 2012. In his report at P17 SP8 summarised the precarious situation of the slope as follows:

> A site visit was carried out on 20th October 2012 to determine the existing conditions of the site by visual inspection. The site visit was attended by Engineers from Mohd Asbi Associates Sdn Bhd (MAAASB) and LAP's representatives.
>
> A critical cross section of the slope cutting area is analysed using SLOPE/W computer program adopting Morgenstern-Price Method, satisfying both the force and moment requirements. The minimum FOS requirement for a cut slope in accordance to JKR's requirement of slopes without reinforcement is 1.40. Clearly, the FOS of cross-section analysed has not achieved its minimum requirement.
>
> The current slope is heavily reliant on the proposed remedial works to ensure its long term stability. As we can see in current site condition and our back analysis (see appendix B) for progressive failure, the progressive

A failure is imminent. Therefore, we recommend the proposed remedial works shall be implemented as soon as possible to prevent further slope deterioration and potential progressive shallow slips could pose very high risk to the water reservoir.

[70] P17 contains nine photographs which give a visual representation of B the situation of the slope. Photograph 3 notes that the width of the slope cut by the third defendant was about 200 meters. The fencing around the said land where the reservoirs are situated can be seen at the crest of the slope. The height of the slope is about 20 meters high. Photograph 4 shows that the overall gradient of the slope was between 40 to 70 degrees. Of grave concern C was the fact that the remaining buffer zone between the slope cutting works and the reservoir was only about 20 meters as depicted in the photograph 7 of P17.

[71] The evidence of SD1 supports the findings of SP8 in material particulars. As an introduction to his report, he states:

D Based on the Lembaga Air Perak (LAP) request and report prepared by his Consultant Mohd Asbi Associates Sdn Bhd, we hereby have proposed a remedial method to rectify as well as to protect the existing slope from further deterioration or failure.

As the critical existing slope is very close to the 2 numbers of LAP E reservoirs, this remedial works must be carried out immediately to prevent any slope failure that can affect the structural integrity of these 2 numbers of reservoirs.

[72] During cross-examination SD1 agreed with counsel for the plaintiff that at the time he was preparing the report around February 2013 the slope F was in a critical condition. In his report P25 he describes the extraction at the slope as:

Extreme cutting of earth have been done on site and to protect the critical slope from further deterioration we have proposed ..."

G He further emphasised what extreme cutting meant in his answer to the question":

Danial : Can you refer to page 45. In your report at paragraphs B you used word extreme cutting of the earth. Can you explain what you mean extreme cutting of the earth?

H SD1 : That mean they cut a lot of the slope. A lot of cutting.

[73] Apart from the evidence of SP8 and SD1, the evidence of SP4, SP6 SP7 and SD6 lend weight to the fact that there was a real danger that the slope created by the third defendant would adversely affect the reservoirs.

I **[74]** The defendants argue that if they were allowed to continue with the soil extraction and making of the terraces the slope would pose no danger to the reservoirs. Further the first and second defendants argue that the

reservoirs were not in any imminent danger as no landslides had occurred from the time they were asked to stop work till the commencement of the remedial works.

[75] At the onset, I have to state I am unable to accept the defendants' contention that if allowed to continue the slope would not pose a danger to the reservoirs. The progression in which the slope was failing had to be abated, to use the words of SD1, "immediately". The material time to consider was at the time the defendants were asked to stop the excavation works. At that time the situation demanded immediate response. It would be unreasonable for the plaintiff to take the risk and allow the excavation work to continue with the knowledge that disaster could strike at any time. It would also be unreasonable for them to be idle despite the work being stopped.

[76] On this issue, I remind myself that although SP8 and SD1 are experts in their fields, it is the court to decide on the ultimate issue as to whether the cutting of the slope had posed a danger to the reservoirs. As regards to this, I can do no better than to reproduce the following passage from the case of *Wong Swee Chin v. PP* [1980] 1 LNS 138 to illustrate this point.

> In the Evidence Act, 1950, opinion of experts are under certain conditions admissible in evidence. Who are experts are explained in section 45 of the Act. Section 46 provides that facts not otherwise relevant are relevant if they support or are inconsistent with the opinions of experts when such opinions are relevant. DW2 was called as an expert witness. Our system of jurisprudence does not generally speaking, remit the determination of dispute to experts. Some questions are left to the robust good sense of a jury. Others are resolved by the conventional wisdom of a judge sitting alone. In the course of elucidating disputed questions, aids in the form of expert opinions are in appropriate cases placed before juries or judges. But, except on purely scientific issues, expert evidence is to be used by the court for the purpose of assisting rather than compelling the formulation of the ultimate judgments. In the ultimate analysis it is the tribunal of fact, whether it be a judge or jury, which is required to weigh all the evidence and determine the probabilities.

[77] After hearing both experts and the evidence in totality as well as considering their respective reports, I find that the excavation of red earth carried out by the third defendant on the land of the first and second defendants had resulted in the structure of the slope to be in a dangerous state posing an immediate threat to the safety to the reservoirs. Indeed, SD1's evidence in cross-examination had corroborated the findings of SP8 in this aspect. In such circumstances, SP8 stated "the progressive failure" is imminent.

[78] That the said land is entitled to the right of support by the first and second defendants' land is not disputed between the parties. This right of support is recognised both in the common law and in the National Land Code (NLC) in the form of s. 44 which relevant part reads as follows:

> 44. Extent of disposal: general.
>
> (1) Subject to the provisions of this Act and of any other written law for the time being in force, any person or body to whom (under this Act or a previous land law) land has been alienated, reserved land has been leased or a temporary occupation licence (including a licence so styled under a previous land law) has been granted in respect of any land, shall be entitled to:
>
> (a) the exclusive use and enjoyment of so much of the column of airspace above the surface of the land, and so much of the land below that surface, as is reasonably necessary to the lawful use and enjoyment of the land;
>
> (b) **the right to the support of the land in its natural state by any adjacent land, and all other natural rights subsisting in respect thereof**; and
>
> (c) ...
>
> (emphasis added)

[79] Section 44 of the NLC had been explained in the Federal Court case *Wong See Lee & Ors v. Ting Siik Lay* [1997] 2 CLJ 205 as follows:

> One form of natural rights is the right to support to form a neighbour's land. It is 'natural' in the sense that it is an inseparable incident of property ownership. It is unlike an easement which must have been acquired by some kind of grant. The natural right is protected through the torts of nuisance and negligence.
>
> It is limited to the support of land in its natural state and does not apply to buildings on the land; but see, *Public Trustee v. Hermann* [1968] 3 NSWR 94 @ 109. Support of buildings can be created in the form of easements: see *Pantalone v. Alaouie* [1989] 18 NSWLR 119.
>
> This common law right of support by neighbouring land has been given statutory recognition by s. 44(1)(b) National Land Code which provides:
>
> > Subject to the provisions of this Act and of any other written law for the time being in force, any person or body to whom (under this Act or a previous land law) land has been alienated, reserved land has been leased or temporary occupation licence (including a licence so styled under a previous land law) has been granted in respect of any land, shall be entitled to the right to the support of the land in its natural state by any adjacent land, and all other natural rights subsisting in respect thereof.

Whether The Third Defendant Is An Agent And Or Servant And Or Contractor And Or Employee Of The First Defendant And Second Defendant?

[80] This issue would also encompass the issue of whether first, second and third defendants are liable for the payments incurred by the plaintiff in remedial works done.

[81] The plaintiff had pleaded that the first and second defendants were responsible for the actions of the third defendant as the third defendant was their agent or servant. The further pleaded that the first, second and third defendants were jointly and severely liable for the damage caused to the said land.

[82] The uncontroverted fact is that the first and second defendants had engaged the third defendant to remove earth from their land and cut terraces for planting rubber trees. The second defendant had given the third defendant specific instructions as to the cutting of the terraces. He gave instructions as well as monitored the excavation work for the terraces. He stated in evidence:

> Berkaitan kepada pembinaan teres pembinaan pokok getah, awak ada beri arahan kepada D3 bagaimana membuat teres teres tersebut?
>
> Ya, saya ada beri arahan kepada D3.
>
> "Teres akan di bina berdasarkan pengalaman D3 dan dipantau oleh saya."

[83] As to whether the third defendant is a servant or agent of the first and second defendants, the test formulated in the case of *Honeywill and Stein, Limited v. Larkin Brothers (London's Commercial Photographers Limited* [1934] 1 KB 191 has been accepted by the courts in this country to determine the issue. There Lord Slesser LJ summarised the test in this manner:

> The determination whether the actual wrongdoer is a servant or agent on the one hand or an independent contractor on the other depends on whether or **not the employer not only determines what is to be done, but retains the control of the actual performance**, in which case the doer is a servant or agent; but if the employer, while prescribing the work to be done, leaves the manner of doing it to the control of the doer, the latter is an independent contractor. (emphasis added)

[84] From the circumstances of this case, I am of the view that the third defendant is a servant or agent of the first and second defendants as not only have they engaged the third defendant but also instructed the third defendant as to how the work was to be done.

[85] From the evidence of SP8 and SD1, there is no doubt that the earth excavation by the third defendant entails considerable risks. The risk was that the slope was in imminent danger of failure. In such a case, the first and second defendants cannot wash their hands of liability for the situation

created by the third defendant. In the case of *Mehrzad Nabavieh & Anor v. Chong Shao Fen & Anor And Another Appeal* [2016] 5 CLJ 236 Her Ladyship Nallini Pathmanathan JCA in discussing the English case of *Dalton v. Henry Angus & Co* [1881] 6 App Cas 740 had this to say:

> That is the general principle, that employers are not liable for the acts of independent contractors. However, in that case, Lord Watson went on to say that in **cases where the work is necessarily attended with risk**, he cannot free himself from liability by binding the contractor to take effectual precautions. **He is bound, as in a question with the party injured, to see that the contract is performed**, and is therefore liable, as well as the contractor, to repair any damage which may be done (emphasis added). *Therefore applying Lord Watson's pronouncement here, the first and second defendants should not be held liable alone. The fourth and fifth defendants should also be liable for the damage which was occasioned to the plaintiffs' property*. (emphasis added)

[86] I am of the opinion that the very act of the third defendant in excavating and removing such a huge amount of earth, as evinced from the number of times the permit 4C was applied for, was by itself inherently risky and perilous. Further as there is a considerable risk of slope failure which would destabilise the land on which the reservoirs stand, the first and second defendants owe a duty to the plaintiff to ensure the work is done properly. They, together with the third defendant, are therefore liable as joint tortfeasors to repay the plaintiff the sum incurred and claimed for the remedial work.

Whether The Plaintiff's Claim Amounting To RM5,668,989.22 Against The Defendants Is Reasonable

[87] The plaintiff's claim is based on oral and documentary evidence of the amount expended in taking remedial action to stop the progressive failure of the slope on the first and second defendants' land. In my opinion, the amount claimed is both reasonable as well as necessary. If this corrective action by the plaintiff was not taken, the result would be catastrophic to say the least. The payments for the remedial work are well documented as can be seen in the evidence of SP2. There was no convincing evidence to show that the amount spent was unreasonable especially so when there were witnesses and documents to support the claim.

Whether The Plaintiff Is Estopped From Claiming Any Damages From The Defendants As A Result Of The Purported Agreement Or Promise By The Plaintiff To Take Over The Land Of The First And Second Defendants And To Finance The Work Of Strengthening The Slope

[88] The first defendant in his evidence states that there were two meetings held with regards to the dangerous situation created by the slope. These meetings form the basis of their contention that they are not liable for any damages as the plaintiff had agreed to acquire that part of their land affect

by the slope. In respect of the alleged "meeting" held on 29 March 2013 as evinced by the first defendant, I note that there is only a letter dated 29 March 2013 (P28) at p. 168 of the common bundle which clearly state that the first defendant would only allow remedial work to be done on their land if the entire of the first and second defendants' land was acquired and that the cost of acquisition would be RM1,650,000. There was however no indication that they would be paying for the remedial work. The stance taken by the first and second defendants earlier is evident in their letter to the plaintiff dated 27 November 2012 (P21) where the first defendant had informed the plaintiff that the first defendant had engaged PYK Consultant (SD1's company) to do the remedial work of which the plaintiff was agreeable to. The first defendant had even asked the plaintiff a little more time to do the remedial and stabilisation work using the correct "spec". The first defendant also wanted the plaintiff to buy over their land for the sum of RM1,650,000.

[89] Again, in the meeting held on 17 June 2014, the minutes show that it was decided by the parties to acquire those parts that would be used for initial remedial work and no other lands. I find as a fact that the parts which the plaintiff wished to acquire were only those parts where remedial work was to be done. There was no indication as to who was to pay for this remedial work.

[90] The first defendant's answer to question 11 at (b) of his witness statement that the plaintiff was to pay for the cost of the remedial work cannot be reconciled with the "keputusan" of the meeting the minutes of which are at P31. There was nothing discussed about the plaintiff agreeing to pay for the cost of the remedial work as alleged by the first defendant. That subject was not discussed as can be seen from the minutes of the meeting or "keputusan" which is reproduced below:

> Keputusan:
>
> (a) Tuan tanah bersetuju dengan kerja-kerja awal yang akan dijalankan oleh Lembaga Air Perak dan membenarkan pihak LAP memasuki tanah terlebih dahulu.
>
> (b) LAP akan menggunakan kawasan yang akan diambil sahaja tidak melewati tanah-tanah lain. LAP memperaku bahawa pembiayaan pengambilan tanah di tanggung oleh LAP.
>
> (c) Pejabat Tanah diminta untuk memproses pengambilan tanah tersebut.

[91] I agree with counsel for the plaintiff that the defendants were only interested with the plaintiff acquiring their land. They had no intention of carrying out any remedial work to remedy the slope contrary to what they had stated in P21. I am of the view that although the plaintiff did cancel the acquisition process they could do so as the acquisition process was not yet

finalised and based on the fact that the first and second defendants were not going to pay for the remedial work. The first and second defendants' contention that the plaintiff had promised to acquire the land and at the same time pay for the remedial work would not be logical when it was evident that the defendants, as joint tortfeasors, had caused the dangerous situation at the slope in the first place.

[92] It had been argued by the first and second defendants that after being "tricked" in gaining access onto his land to do remedial work pursuant to the supposed agreement to acquire the land, the plaintiff is to be regarded as a trespasser onto his land. This, argues counsel for the defendants had caused the remedial work by the plaintiff on the first and second defendants' land as well as for the plaintiff's claim for damages to be illegal.

[93] I find that the plaintiff or their servants were not trespasser as they had the permission of the first defendant to do remedial work on the land. I am of the view that even if the plaintiff had purportedly trespassed unto the first and second defendants' land, this does not affect the plaintiff's claim of negligence against the defendants. It does not detract from the fact that the slope was in a dangerous position because of the negligent acts created by the defendants. Neither does it detract from the fact that the plaintiff had to pay the various contractors for the remedial work carried out in order to stabilise the slope and ensure the safety of the reservoirs.

[94] Further the question of the purported renege by the plaintiff of their promise and the question of trespass are distinct matters from the present claim. In this respect, the first and second defendants did realise this when the first and second defendants made an application in encl. 58 to amend their pleadings midway through the trial to add a counterclaim to his defence. This counterclaim was based on the allege trespass onto the first and second defendants' land by the plaintiff in order to do the urgent remedial work. This court however dismissed encl. 58 as it was made at a late stage where seven witnesses had been called by the plaintiff. This is coupled with the fact that the so-called trespass was within the knowledge of the defendants from the very beginning. The dismissal of encl. 58 was justified under the principles set out in *Hong Leong Finance Bhd v. Low Thiam Hoe & Another Appeal* [2015] 8 CLJ 1. From the records, there was no appeal from this decision.

[95] In the circumstances, I find that it was reasonable for the plaintiff to commence remedial work on the defendants' land bearing in mind the urgency of the situation as gleaned from the evidence of SP8 and his report in P17 and D1.

Whether The Excavation Of Red Earth On The Land Of The First And Second Defendants Had Been Carried Out In Compliance With The Conditions Imposed By The Third Party

[96] This issue is also associated to the question as to whether the first third party was liable as it had issued the excavation permit and according to the defendants had a duty to ensure that the excavation work did not endanger the said land.

[97] The main contention of the first and second defendants was that the first third party had successively issued the 4C permit to the third defendant. The third party knew of the existence of the reservoir. The third party had inspected the excavation work being carried out by the third defendant.

[98] From the evidence of SD4, it can be seen that at the issuance of the first 4C permit and in the subsequent renewals the accompanying letter to the permits from the third party clearly stated that the third defendant has to comply with the conditions set by Jabatan Teknikal which was attached and Pekeliling PTG.PK Bilangan 5 Tahun 2009 where a copy was provided to the third defendant.

[99] The Pekeliling PTG.PK Bilangan 5 Tahun 2009 among other things state the following:

> Tanah yang digali hendaklah juga mengikut peraturan seperti berikut:
>
> (i) Pengalian tanah tidak dibenarkan sejarak jauh 62 meter dari hujung sempadan tanah kepunyaan orang lain yang berkenaan.
>
> (ii) Di dalam kawasan pengalian tanah yang diluluskan, curam bagi tebing tanah yang dibuat hasil daripada kerja-kerja menggali **hendaklah sekurang-kurangnya 1:5 (tegak : uffuk) untuk jarak jauh 62** meter daripada sempadan yang tidak melebihi 6 meter dari aras jalanraya untuk jarak jauh lagi 45 meter. (emphasis added)

[100] That the third party had received the said Pekeliling is evident from the evidence of SD4. This is corroborated by a receipt for the purchase of a copy of the Pekeliling by the third defendant is shown in D52. D52 was issued on 23 May 2012. The third defendant therefore should have known of the terms and conditions of the permit and yet did not abide to them.

[101] There was evidence from SP2, SP8, SD1 and SD6 that the third defendant had breached the specified condition in the Pekeliling. The excavation carried out was much less than the 62 meters from the fence to the said land. In the circumstances, the actions of the third defendant had caused a dangerous situation. As such, the third party could not be blamed for the damage caused.

[102] The third defendant was an experienced contractor. In his evidence, he stated he was "biasa" or familiar with procedures for soil extraction. There is evidence from the defendants that the boundaries of the adjoining lands, including the said land, had been carefully determined before

excavation work had begun. If the boundaries of the first and second defendants' land had been determined and marked by the defendants as stated in the evidence of the first defendant, surely the third defendant would have known of the existence of the reservoirs as he said he was careful not to go beyond the boundary. I therefore cannot accept the contention that the third defendant did not know of the existence of the reservoirs.

[103] There was evidence that the third party had periodically inspected the area of the excavation. I accept that these checks, as evinced from the evidence of SD6 was only to monitor the amount of earth excavated by referring to the docket book. They had no duty to monitor or supervise the work progress of the third defendant.

[104] Permitting the third defendant to extract earth does not mean that the third defendant could extract earth with a degree of impunity so as to disregard the rights of the plaintiff and safety of the said land.

Conclusion

[105] It is settled law that the burden of proving negligence is on the plaintiff. The plaintiff must prove that the defendants owe it a duty of care, that the duty of care was breached and that the said breach caused the plaintiff to suffer damages. In *Pemilik Dan Kesemua Orang Lain Yang Berkepentingan Dalam Kapal "Fordeco No 12" Dan "Fordeco No 17" v. Shanghai Hai Xing Shipping Co Ltd* [2000] 1 CLJ 605; [2000] 1 MLJ 449, the Federal Court held that:

> An action lies whenever the plaintiff has suffered damage by reason of the negligent performance of any duty which the defendant, his agent or servant owes to the plaintiff. **There are three elements that together constitute the right of action for negligence, namely, duty, breach and damage**. (*Bullen & Leake & Jacob's on Precedents of Pleadings* (13th Edn, 1990) at p 678). Hence, the burden is on the plaintiff to prove these elements. It is settled law that the onus of proving negligence is on the plaintiff (*Neo Chan Eng v. Koh Yong Hoe* [1960] 1 LNS 77; [1960] MLJ 291).
>
> (emphasis added)

[106] Based on the principle as expounded in the case of *The Fordeco Nos 12 and 17* I find that the plaintiff had successfully proven their case against the defendants for negligence. As for the third party claim, based on the evidence adduced, I find that the third parties were not negligent and cannot be held liable for the negligence of the defendants.

[107] I therefore allow the plaintiff's claim as stated in the statement of claim. I allow cost of RM20,000 to the plaintiff to be paid by the defendants jointly and severally. I also dismiss the first and second defendants' claim against the third parties. I award cost of RM6,000 to the third parties to be paid by the first and second defendants jointly and severally.